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No. 99-62

In the Supreme Court of the United States

SANTA FE INDEPENDENT SCHOOL DISTRICT,
Petitioner,
v.
JANE DOE, *ET AL.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF *AMICI CURIAE* STATE OF TEXAS, ATTORNEY GENERAL OF TEXAS JOHN CORNYN, GOVERNOR OF TEXAS GEORGE W. BUSH, STATES OF ALABAMA, COLORADO, KANSAS, LOUISIANA, MISSISSIPPI, NEBRASKA, SOUTH CAROLINA, AND TENNESSEE IN SUPPORT OF PETITIONER

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STATEMENT OF *AMICI* INTEREST

The State of Texas, Texas Attorney General John Cornyn, Texas Governor George W. Bush, and the States of Alabama, Colorado, Kansas, Louisiana, Mississippi, Nebraska, South Carolina, and Tennessee, appear as *amici curiae* and urge the Court to grant this petition. *Amici curiae* have an interest in this case because the Fifth Circuit's judgment will require governmental officials to review and essentially censor student-initiated and student-given speech even though there is no state involvement in the decision that the speech occur or in the selection of the speaker. *Amici*'s interest here is substantial and direct, because the holding will emanate far beyond public school sponsored events. Under this decision:

- Officials will be required to abandon their roles as neutral observers of religious speech and instead take up their pens as editors and censors.

- Officials must enforce and defend these unprecedented requirements.

- Officials, in enforcing and defending the *Santa Fe I.S.D.* requirements, will be compelled to endorse certain types of religious speech resulting in deep state entanglement with religion.

- Officials will be forced to discriminate against any religious viewpoint that is not nonsectarian and nonproselytizing.

This decision places states in an untenable, unacceptable, and unconstitutional position, despite established precedent to the contrary. In addition, since the petition was filed, the Eleventh Circuit decided *Chandler v. James*, Nos. 97-6898,

97-6953, 1999 WL 493495 (CA11 July 13, 1999), which directly conflicts with the Fifth Circuit's decision in *Santa Fe I.S.D.* In a factually similar case involving student-initiated speech at graduation and sporting events, the Eleventh Circuit held that "genuinely student-initiated religious speech is private speech endorsing religion" and is "fully protected by both the Free Exercise and the Free Speech Clauses of the Constitution." *Id.* at *6. The Court should grant certiorari to address these important issues and resolve this split in the circuit courts.

The parties have given their consent to the filing of this brief, as shown in the letters of consent that accompany this brief. SUP. CT. R. 37.2(a).

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SUMMARY OF THE ARGUMENT

To everything, turn, turn, turn,
There is a season, turn, turn, turn,
And a time to every purpose under heaven.

If a student speaker uses this quote in a graduation invocation, would it be considered nonsectarian and nonproselytizing because it is from a rock song,[1] or would it be considered sectarian and proselytizing because it is from the Old Testament?[2] Would the fact that the quote refers to "heaven" immediately make it off limits? Or maybe it could pass muster because, in reality, the song protests the Vietnam War instead of promoting religious values.

If the Fifth Circuit's decision in *Doe v. Santa Fe I.S.D.*[3] stands, school officials will suffer the Promethean punishment of being forced again and again to judge, and ultimately censor, the content and message of student-initiated speech. This result "achieves the jurisprudentially rare result of offending not only one, but three provisions within the First Amendment." *Santa Fe I.S.D.*, 168 F.3d at 825 (Jolly, J., dissenting). The Fifth Circuit's decision also directly conflicts with the Eleventh Circuit's recent decision in *Chandler v. James*, Nos. 97-6898, 97-6953, 1999 WL 493495 (CA11 July 13, 1999), which reversed a district court's injunction prohibiting vocal prayer or other devotional speech at school

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[1] These are the opening lyrics from the song *Turn, Turn, Turn* by The Byrds.

[2] Ecclesiastes 3:1, reads: "To everything there is a season, and a time to every purpose under the heaven." *Ecclesiastes* 3:1 (King James). The song is taken from Ecclesiastes 3:1-8.

[3] *Doe v. Santa Fe I.S.D.*, 168 F.3d 806 (CA5 1999), *petition for cert. filed* (U.S. July 6, 1999) (No. 99-62).

events. The *Chandler* court rejected the argument that the state has a positive duty to censor student speech if it is religious. *Id.* at *5. The Court should grant the petition to resolve this split among the circuits and prevent the Fifth Circuit's constitutionally defective rule from becoming precedent.

ARGUMENT

I. THE FIFTH CIRCUIT'S OPINION PLACES SCHOOLS IN AN UNTENABLE, UNACCEPTABLE, AND UNCONSTITUTIONAL POSITION.

A. The Establishment Clause Requires Officials to Be Neutral Towards Religion.

Neutral accommodation of religion is a consistent thread running throughout Establishment Clause jurisprudence.[4] From the 1947 decision in *Everson v. Board of Education*[5] to the recent case of *Lee v. Weisman*,[6] the Court has instructed that, in all things, the state must be neutral to religion, neither advancing nor inhibiting it.

- "[The Establishment Clause] requires the state to be a neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions, than it is to favor them." *Everson*, 330 U.S. at 18.

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[4] *See* Richard S. Vacca, et al., Commentary, *Accommodation of Religion Without Establishment of Religion*, 115 Ed. Law Rep. 9 (West 1997).

[5] *Everson v. Board of Educ.*, 330 U.S. 1 (1947).

[6] *Lee v. Weisman*, 505 U.S. 577 (1992).

- "The government must be neutral when it comes to competition between sects." *Zorach v. Clauson*, 343 U.S. 306, 314 (1952).
- "The First Amendment leaves the Government in a position not of hostility to religion but of neutrality." *Engel v. Vitale*, 370 U.S. 421, 443 (1962) (Douglas, J., concurring).
- "In the relationship between man and religion, the State is firmly committed to a position of neutrality." *School Dist. of Abington Township v. Schempp*, 374 U.S. 203, 226 (1963).
- "[T]here is a crucial difference between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect. We think that secondary school students are mature enough and are likely to understand that a school does not endorse or support student speech that it merely permits on a nondiscriminatory basis. The proposition that schools do not endorse everything they fail to censor is not complicated." *Board of Educ. v. Mergens*, 496 U.S. 226, 250 (1990) (citations omitted).
- "Nearly half a century of review and refinement of Establishment Clause jurisprudence has distilled one clear understanding: Government may neither promote nor affiliate itself with any religious doctrine or organization, nor may it obtrude itself in the internal affairs of any religious institution." *Lee*, 505 U.S. at 599 (Blackmun, J., concurring).

Despite the "clear understanding" that the Constitution demands that the state neutrally accommodate all religious (and nonreligious) speech, *see id.*, the Fifth Circuit's decision

in *Santa Fe I.S.D.* plunges school districts into a quagmire of minute and exacting decisions over whether potentially religious[7] speech meets the court's nonsectarian, nonproselytizing criteria.

By holding that the *only* way that the Santa Fe I.S.D. policies can be squared with the Constitution is to require that student-initiated speech be nonsectarian and nonproselytizing, the Fifth Circuit requires school officials to cast aside their roles as neutral observers of student-initiated religious speech and don the hat of editor/censor. The Fifth Circuit reaches this conclusion despite this Court's holdings that state review of prayer results in excessive entanglement. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 845-46 (1995); *Lemon v. Kurtzman*, 403 U.S. 602, 619 (1971); *see also Ingebretsen v. Jackson Pub. Sch. Dist.*,88 F.3d 274, 278 (CA5), *cert. denied*, 519 U.S. 965 (1996).

Moreover, government-written or sponsored prayers, no matter how bland or ecumenical,[8] unquestionably violate the

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[7] The Santa Fe school district's policies do not require the speech to be religious, because, as Judge Jolly notes in his dissent, "[n]either the dictionary definitions cited by the majority nor our own precedents require an interpretation of 'invocation' or 'benediction' grounded in religion." *Santa Fe I.S.D.*, 168 F.3d at 831 (Jolly, J., dissenting).

[8] The Fifth Circuit's insistence that school districts can be entangled in religious speech as long as it is nonsectarian and nonproselytizing is difficult to understand. It is not the content of the religious speech that ran afoul of the Establishment Clause in *Engel* and *Lee*, it was the government's role in endorsing or proscribing the speech that was unconstitutional.

> Though the efforts of the school officials in this case to find common ground appear to have been a good-faith attempt to recognize the common aspects of religions and not the divisive ones, our precedents do not permit

Establishment Clause. *Engel*, 370 U.S. at 425-34. But is there any logical distinction between government-written prayers and government-edited and censored prayers? Indeed, it is difficult to conceive of a policy more inimical to neutrality than one that requires school officials to review and edit student-initiated religious speech to ensure that it meets state-defined criteria.

And, as a practical matter, how will school districts enforce these requirements?[9] What if the graduation keynote speaker, a non-student, without warning school administrators, passionately advocates that Jesus Christ should take the central role in a person's life? Would the speech violate *Santa Fe I.S.D.*? Assuming that it would, does that mean that the school officials must review every speaker's remarks for religious content and state censure? Or are officials only required to review student-given invocations or benedictions? Not only will this requirement excessively entangle school officials with

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> school officials to assist in composing prayers as an incident to a formal exercise for their students. And these same precedents caution us to measure the idea of a civic religion against the central meaning of the Religion Clauses of the First Amendment, which is that all creeds must be tolerated and none favored.

Lee, 505 U.S. at 590 (citing *Engel*, 370 U.S. at 425)).

[9] In *Chandler*, the district court answered this question by enjoining the students' religious speech and ordering that, should any student violate the injunction, school officials must "take appropriate disciplinary action as they would for any violation of school disciplinary rules, said disciplinary action being calculated to cause the cessation of the violative conduct as it occurs and to deter similar conduct in the future." *Chandler v. James*, 985 F.Supp. 1062, 1064 (M.D. Ala. 1997), *aff'd in part and vacated in part*, Nos. 97-6898, 97-6953, 1999 WL 493495 (CA11 July 13, 1999).

religion, but it will place an incredible burden on state institutions and officials who know too well that an out-of-place phrase with questionable content could result in litigation. Rather than face this Herculean task, many schools may prohibit all student speech having the potential for religious content. This result, however, is no less constitutionally infirm.

The Santa Fe I.S.D. graduation policy[10] and football policy[11] succeed in safeguarding governmental neutrality toward student-initiated, potentially religious speech. Indeed, the policies do not even require a prayer at all, but allow students to determine what message, if any, to deliver without official oversight.[12] Requiring school officials to censor

[10] *See Santa Fe I.S.D.*, 168 F.3d at 811-13.

[11] *See id.* at 812.

[12] The Fifth Circuit mistakenly concludes that the Santa Fe policies only allow students to deliver "very circumscribed statements that under any definition are prayers." *Id.* at 820. But the graduation policy allows students to deliver an "invocation" or "benediction," which are not necessarily prayers, while the football policy allows students to give an "invocation" or "message." Petition for Writ of Certiorari at 4, 6, App. F, App. G, *Santa Fe I.S.D. v. Doe*, (U.S. July 6, 1999) (No. 99-62). According to Webster's, the definition of "invocation" includes "the act or process of petitioning for help or support . . . a prayer of entreaty . . . a calling upon for authority or justification . . . a formula for conjuring: INCANTATION . . . [and] an act of legal or moral implementation: ENFORCEMENT." WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 637 (1983). The definition of "benediction" is "an expression of good wishes . . . the invocation of a blessing . . . [and] something that promotes goodness or well-being." *Id.* at 143; *see also supra* note 7 (noting Judge Jolly's dissent on this issue). Regardless of the definition, however, the fact remains that students not only determine whether to have an invocation, benediction, or any message at all, but they also decide what the content of their message will be.

potentially religious speech not only destroys neutrality, but requires the school districts to engage in constitutionally forbidden viewpoint discrimination.

B. The *Santa Fe I.S.D.* Test Requires School Districts to Engage in Viewpoint Discrimination.

The Fifth Circuit's holding that religious speech under the Santa Fe I.S.D. graduation policy must be nonsectarian and nonproselytizing requires school officials to engage in religious viewpoint discrimination. *See Santa Fe I.S.D.*, 168 F.3d at 833-34 (Jolly, J., dissenting). The majority opinion permits one type of religious speech—ecumenical—to the exclusion of all others. But once ecumenical religious speech is permitted, the state must neutrally accommodate all religious viewpoints. *See Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 394 (1993) (quoting *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 806 (1985)); *Widmar v. Vincent*, 454 U.S. 263 (1981).

The Fifth Circuit rejected Santa Fe I.S.D.'s argument that governmental review and approval of only certain kinds of prayer is impermissible viewpoint discrimination, reasoning that the graduation ceremony is not a limited public forum subject to viewpoint discrimination. *Santa Fe I.S.D.*, 168 F.3d at 818-21. Remarkably, the majority admitted that if the graduation program did create a limited public forum, then its proscription of sectarian, proselytizing prayer would constitute unconstitutional viewpoint discrimination. *Id.* at 821.[13] This

[13] The majority concluded: "Thus, if public forum analysis were applicable, then *Clear Creek*'s proscription of prayer that is sectarian and proselytizing would violate the First Amendment after all, but would do so on grounds we never considered in *Clear Creek II*." *Santa Fe I.S.D.*, 168 F.3d at 821 (citing *Jones v. Clear Creek I.S.D.*, 977 F.2d 963 (CA5 1992),

admission is fatal to the Fifth Circuit's logic, however. The Santa Fe I.S.D. graduation policy creates a limited public forum because it places no barriers on speech other than the reasonable time, place, and manner restriction limiting the class of potential speakers to graduating students. *Id.* at 832-33 (Jolly, J., dissenting). Regardless of the type of forum, however, viewpoint discrimination is constitutionally prohibited. *Id.* at 833. Once the state creates a forum of any kind and allows some religious speech, it may not exclude other religious viewpoints. *Id.*

The Court could not be more clear on this subject. "[S]tate regulation of speech should be content-neutral . . . ." *Widmar*, 454 U.S. at 277. But the Fifth Circuit's decision requires just the opposite—*content-based* state regulation of speech. This decision puts the school districts on an unavoidable collision course with the Constitution, and it must be reversed.

C. The Fifth Circuit's Decision Requires School Officials to Become Excessively Entangled in Private Religious Speech.

Instead of enforcing the Establishment Clause, the Fifth Circuit's decision will actually force school districts to violate it. By requiring school officials to preview student messages to determine whether they are overly sectarian or proselytizing, the Fifth Circuit will force school officials to excessively entangle themselves in private religious speech in violation of the Establishment Clause. Not only would review of student prayers by school officials prove unwieldy and unmanageable, it would also cause officials to wade into the constitutional quagmire of editing students' religious speech.

There is no doubt that the Fifth Circuit's content-based

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cert. denied, 508 U.S. 967 (1993)).

restrictions will force school officials to require students to submit their prayers for review prior to school events. The Fifth Circuit acknowledged that its holding would require a school district to review the content of student-initiated, student-led prayers. *Santa Fe I.S.D.*, 168 F.3d at 821 n.12 (citing *Jones v. Clear Creek I.S.D.*, 977 F.2d 963, 967 (CA5 1992)). This new requirement will have perverse and unconstitutional effects, however. Impromptu remarks would have to be discouraged to avoid uncensored speech. Officials must then make the inherently subjective determination of what language in a student's prayer crosses the line. Every determination made by a school official—whether to censor a prayer or to approve it—will subject the school district to potential liability. Rather than face this unpleasant and unconstitutional task, school officials may ultimately prohibit all student speech at school events that could have potential religious overtones.

The Court has repeatedly recognized that government oversight of student-initiated religious speech entangles the state in religion. In *Lemon v. Kurtzman*, 403 U.S. 602, 619 (1971), the Court held that a state statute providing aid to church-related elementary and secondary schools excessively entangled church and state because it would require "comprehensive, discriminating, and continuing state surveillance" to meet the requirements of the First Amendment.

> This kind of state inspection and evaluation of the religious content of a religious organization is fraught with the sort of entanglement that the Constitution forbids. It is a relationship pregnant with dangers of excessive government direction of church schools and hence of churches.

Id. at 620.

The Court recognized again in *Widmar v. Vincent*, 454 U.S. 263, 277 (1981), that a university policy that required the content-based exclusion of religious speech violated the fundamental principle that state regulation of speech should be content-neutral. The Court observed that requiring the university and ultimately the courts "to inquire into the significance of words and practices to different religious faiths .... would tend inevitably to entangle the State with religion in a manner forbidden by our cases." *Id.* at 270 n.6.

And in *Rosenberger v. Rector & Visitors of University of Virginia*, 515 U.S. 819, 845-46 (1995), the Court held that a university policy excluding financial support to a student religious newspaper violated the First Amendment. The Court expressly disapproved the argument that the school was required, "in order to avoid a constitutional violation, to scrutinize the content of student speech, lest the expression in question—speech otherwise protected by the Constitution—contain too great a religious content." *Id.* at 844. "[O]fficial censorship would be far more inconsistent with the Establishment Clause," the Court observed. *Id.* at 845.

Requiring school officials to censor student prayers is essentially the same as having an official compose the prayer in the first place. The Court long ago recognized that government "should stay out of the business of writing or sanctioning official prayers and leave that purely religious function to the people themselves and to those the people choose to look to for religious guidance." *Engel v. Vitale*, 370 U.S. 421, 435 (1962). Indeed, "[t]he First Amendment was added to the Constitution to stand as a guarantee that neither the power nor the prestige of the Federal Government would be used to control, support or influence the kinds of prayer the American people can say." *Id.* at 429.

Instead of following this Court's admonitions against state censorship of religious speech, the Fifth Circuit elevated the "nonsectarian," "nonproselytizing" requirement of some school prayer policies to the level of a constitutional mandate. However, this Court has rejected the notion that nonsectarian prayers could resurrect an otherwise unconstitutional government-sanctioned prayer. *See Lee v. Weisman*, 505 U.S. 577, 588-90 (1992); *id.* at 616 (Souter, J., concurring); *Engel*, 370 U.S. at 430.

The Court in *Lee* observed that "though the First Amendment does not allow the government to stifle prayers which aspire to [nonsectarian] ends, neither does it permit the government to undertake that task for itself." 505 U.S. at 589. By forcing school districts to police student speech to stamp out sectarian or proselytizing messages, the Fifth Circuit is requiring officials to undertake a sectarian agenda in violation of the Establishment Clause.

The Fifth Circuit's logic extends beyond student-initiated invocations and benedictions, and ultimately could apply to all speech at school-sponsored events. Will school officials have to preview the contents of a speech any time a speaker could potentially inject a sectarian or proselytizing comment into it? Speakers at graduations, awards ceremonies, speech classes, anti-drug programs, student plays, and football banquets will be potentially subject to the nonsectarian, nonproselytizing requirements imposed by the Fifth Circuit.

A student could give a speech to his class discussing his belief or disbelief in God. A recovering drug addict might testify at a mandatory anti-drug program that he owes his recovery to Jesus Christ. Students could decide to put on a play celebrating religion, such as *Jesus Christ Superstar* or *Godspell*. All of these activities could potentially fall under the ambit of the Fifth Circuit's decision. If school officials do

not censor this speech beforehand, will they have to decide whether to pull the plug on the microphone or use the proverbial cane to pull the offending speaker offstage? Either way, school districts are faced with an unconstitutional Catch-22. This Court should grant certiorari to correct the Fifth Circuit's grievous error.

D. The State Can Advance Other Secular Purposes for a Student-Led Invocation Other than Solemnization.

Deciding that an invocation is only appropriate at "solemn" events, the Fifth Circuit reaches the remarkable conclusion that ceremonial prayer is never appropriate at football games because football games are not solemn.[14] Not only does this holding underestimate the devotion some have to high school football, it mistakenly and unnecessarily limits the category of acceptable secular purposes that can support ceremonial prayer. Solemnization is not the only permissible secular purpose. It is simply "*a* legitimate secular purpose of ceremonial prayer."[15] *Clear Creek*, 977 F.2d at 966 (emphasis added).

As Judge Jolly pointed out in his dissent, there are legitimate secular purposes underlying student-given

[14] "Now we come to the remarkable holding of the majority that, for the most curious reasons, the First Amendment allows speech at graduation ceremonies but bars speech at sporting events. In short, there is a total absence of merit to the contention that the Football Policy might be constitutionally deficient when the graduation policy is not." *Santa Fe I.S.D.*, 168 F.3d at 834 (Jolly, J., dissenting).

[15] Although the majority in *Santa Fe I.S.D.* scoffed at the idea that there could be a secular purpose in having sectarian or proselytizing prayers, *see Santa Fe I.S.D.*, 168 F.3d at 816-17, states have an interest in having a nondiscriminatory policy that does not restrict the content of prayers.

invocations before football games, such as promoting honest and fair play in an otherwise rough and dangerous sport, encouraging clean competition and team work, and striving for individual excellence. *See Santa Fe I.S.D.*, 168 F.3d at 835 (Jolly, J., dissenting). Indeed, these are values that public schools seek to instill in students on a daily basis.

The Fifth Circuit's condemnation of Santa Fe's football policy underscores the majority's basic misunderstanding of prior Supreme Court authority. The content of the speech is not the focus of the Court's inquiry. Instead, it is whether school officials neutrally accommodate all speech in a nondiscriminatory fashion. The first paragraph of the Santa Fe football policy achieves exactly that. The policy does not require a prayer at all, but allows students to determine whether "to deliver a brief invocation and/or message." Petition for Writ of Certiorari at 4, App. F, *Santa Fe I.S.D. v. Doe*, (U.S. July 6, 1999) (No. 99-62). The Fifth Circuit erred here, and this Court should hold that the policy is constitutional.

II. This Case Requires Review to Resolve a Split in the Circuits on this Important Issue.

Since the petition for certiorari was filed in this case, the Eleventh Circuit handed down an opinion that directly conflicts with the Fifth Circuit's decision in *Santa Fe I.S.D.*

In *Chandler v. James*, Nos. 97-6898, 97-6953, 1999 WL 493495 (CA11 July 13, 1999), the Eleventh Circuit considered a district court's permanent injunction prohibiting vocal prayer or other devotional speech in schools. Although the injunction did not prohibit voluntary prayer at school so long as it was purely private, it did prohibit all public prayer or devotional speech by students or other private individuals at school or school-related events, such as in the classroom, at school assemblies, and at sporting events.

The Eleventh Circuit vacated the injunction and held that "genuinely student-initiated religious speech is private speech endorsing religion" and is "fully protected by both the Free Exercise and the Free Speech Clauses of the Constitution." *Id.* at *6. "'Students do not shed their constitutional rights . . . at the schoolhouse gate.'" *Id.* at *6 (quoting *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 506 (1969)).

In contrast to the Fifth Circuit, the Eleventh Circuit rejected the argument that the state has a positive duty to censor student speech if it is religious. *Id.* at *5. "The suppression of student-initiated religious speech is neither necessary to, nor does it achieve, constitutional neutrality towards religion. For that reason, the Constitution does not permit its suppression." *Id.* Recognizing that government must be neutral toward religion, the court found that the discriminatory suppression of student-initiated religious speech demonstrates hostility toward religion, not neutrality. *Id.* at *6. The court concluded that permitting students to engage in religious speech signifies neither state approval nor disapproval of that speech. *Id.*[16]

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[16] Interestingly, the parties in *Chandler* did not contest a ruling by the district court that declared unconstitutional an Alabama statute that, like the ruling of the Fifth Circuit in this case, discriminated against student-initiated prayers that are proselytizing and sectarian. *Chandler v. James*, 958 F.Supp. 1550, 1559-62 (M.D. Ala. 1997), *aff'd in part and vacated in part*, Nos. 97-6898, 97-6953, 1999 WL 493495 (CA11 July 13, 1999). The district court concluded: "The Alabama legislature has defined its public school students' free speech and prayer rights too narrowly. To the extent that students' free speech rights attach, they are free to engage in *sectarian, proselytizing* religious speech." *Id.* at 1560 (emphasis in original); *see also Ingebretson v. Jackson Pub. Sch. Dist.*, 88 F.3d 274, 278 (CA5), *cert. denied*, 519 U.S. 965 (1996) (holding unconstitutional Mississippi statute allowing nonsectarian, nonproselytizing student-initiated prayer at school events and observing that the statute would "inevitably . . . force" the state "to decide who prays and which prayers qualify as nonsectarian and nonproselytizing").

In reaching its decision, the Eleventh Circuit addressed a fundamental question that was glossed over by the Fifth Circuit: who is the state actor? Is it the student? Is the student speech attributable to the state?

Answering these questions in the negative, the Eleventh Circuit correctly noted that the government must remain neutral and play no role in the speech; the fact that the speech is permitted does not run afoul of the First Amendment. Unless the school is using the student as a "surrogate" or is commanding the speech, there is no state action. "Religious speech by students does not become forbidden 'state action' the moment the students walk through the schoolhouse door." *Chandler*, 1999 WL 493495, at *6.

The Fifth Circuit's decision, however, implicitly assumes that students are somehow transformed into state actors.[17] This astonishing conclusion conflicts with this Court's established

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[17] In *Adler v. Duval County School Board*, 174 F.3d 1236, 1251 (CA11 1999), *reh'g en banc granted and opinion vacated*, 1999 WL 354889 (CA11 June 3, 1999), the Eleventh Circuit panel held that a school policy allowing unrestricted student-initiated "messages" at the beginning and end of high school graduation ceremonies violated the Establishment Clause. Unlike the Fifth Circuit, the *Adler* court explicitly relied on its determination that students became state actors because the school delegated one portion of the ceremony to students. *Id.* at 1246-47. The Eleventh Circuit apparently has reconsidered this conclusion and has granted the petition for rehearing and vacated this opinion. Although the Fifth Circuit never says so directly, it apparently reached the same conclusion as the panel in *Adler*, as it revealed in a footnote stating that student-led graduation prayers "do not constitute private speech." *Santa Fe I.S.D.*, 168 F.3d at 821 n.12.

First Amendment precedent, as well as the Eleventh Circuit's decision in *Chandler*.

The issues addressed in these cases touch on some of our most treasured and profound rights. As noted in the petition for certiorari, other circuits have grappled with these issues and will continue to do so. Guidance from the Court is necessary.

CONCLUSION

For these reasons, *amici* respectfully request that the Court grant the petition for writ of certiorari.

Respectfully submitted,

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